BAR ASSOCIATION OF SAN FRANCISCO

Report of Section on Reform of Civil and Criminal Procedure

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REPORT OF

Section on Reform of Civil and Criminal Procedure

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Report of Section on Reform of Civil and Criminal Procedure

San Francisco, October 11th, 1910.

HON. CURTIS H. LINDLEY,

President Bar Association of San Francisco.

Sir:

The section of the Bar Association of San Francisco on "Reform of Civil and Criminal Procedure", respectfully presents the following report:

CIVIL PROCEDURE

I.

THE PLEADINGS

One of the steps in an action where much delay occurs is in bringing the cause to issue. The time demurrer is a frequent cause of delay. We believe that if the defendant were required to answer and demur at the same time no injustice would result and, on the other hand, we think the practice of raising immaterial points by demurrer, which is now prevalent, would be greatly discouraged. To that end we recommend the following amendments:

Amend Section 430 of the Code of Civil Procedure so as to Read as Follows:

SECTION 430. The defendant may demur to the complaint within the time required in the summons to answer and may demur and answer at the same time. If the defendant demurs without answering he shall be deemed to have waived the right to answer.

The defendant may demur to the complaint when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;
2. That the plaintiff has not legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties plaintiff or defendant;
5. That several causes of action have been improperly united, or not separately stated;
6. That the complaint does not state facts sufficient to constitute a cause of action.

The changes consist in

(a)—Adding the words "and may demur and answer at the same time", which are taken from the present section 431.

(b)—Adding the words "If the defendant demurs without answering he shall be deemed to have waived the right to answer." The purpose of this amendment is to make it incumbent upon the defendant, if he desires both to demur and answer, to do so at the same time. Under the present provisions of the Code the defendant *may* demur and answer at the same time (section 431). The amendment changes the rule so that if there be a demurrer and an answer they *must* be filed together. Of course the defendant may answer without demurring and may demur without answering, but in the latter case he stands or falls upon his demurrer. If the demurrer be sustained and the complaint be amended the defendant can then proceed *de novo* to demur and answer together or answer without demurring, etc., as to an original complaint. The proposed amendment of section 437 *infra,* permitting answers by general denial to all complaints will so simplify the answer that it will be as easy to answer as to demur, and we think the demurrer will then be restricted to its real purpose of pointing out defects in the complaint that are material. Under the present practice the defendant may set up inconsistent defenses in his answer and he does no more than this when he demurs and answers at the same time. Many of the states provide that the defendant may demur and answer at the same time and the practice contemplated by the proposed amendment now prevails in Arizona (Rev. Statutes, 1901, section 1350) and Texas. See Sayles' Texas Civil Statutes, 1897, article 1262, which reads as follows:

The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; provided that he shall file them all at the same time, and in due order of pleading.

The Virginia Code of 1904, section 3264, provides:

The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issues on the pleas in abatement shall be first tried.

(c)—Striking out the provisions allowing demurrer on the ground of ambiguity, unintelligibility and uncertainty.

We think these provisions are not of real value and that their effect is to unduly delay litigation without any corresponding advantage. Many of the states provide that there shall be no special demurrers.

Florida, General Statutes, 1906, section 1430;
Maryland, Public General Laws, page 1633, article 75, section 6;
Mississippi, Code 1906, section 761;
New Jersey, General Statutes, page 2557, section 139;
New York, Stover's Annotated Code of Civil Procedure, 1902, section 488.

Amend Section 431 of the Code of Civil Procedure so as to Read as Follows:

SECTION 431. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein.

The amendment strikes out the words "and the defendant may demur and answer at the same time" as they have been transferred to section 430 *supra*.

Amend Section 437 of the Code of Civil Procedure so as to Read as Follows:

SECTION 437. The answer of defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial upon that ground.

The change consists in striking out of the present section the provisions which make different rules for denying verified and unverified complaints.

The purpose of the amendment is to make specific denials unnecessary so that a general denial may be made in every case. The rule requiring the answer to be verified where the complaint is verified is, of course, not changed, and under the amended section the defendant cannot properly deny allegations of a verified complaint which he cannot deny under oath.

We find that California and Oregon, Nevada and Idaho, which have patterned after her, are practically alone in requiring specific denials.

The advantage of the general denial is tersely stated in *Stone* v. *Quaal,* 29 N. W. 326, Minn., as follows:

"A general denial is used instead of specific denials as a matter of convenience and has that consideration to commend it . . . in effect it is precisely the same as if each of the allegations so denied were specifically and separately referred to and denied. It is of no greater and no less effect."

Amend Section 444 of the Code of Civil Procedure so as to Read as Follows:

SECTION 444. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim.

This amendment strikes out the provisions for demurring to an answer on the grounds of ambiguity, unintelligibility and uncertainty to make the section conform to section 430 *supra.*

Amend Section 472 of the Code of Civil Procedure so as to Read as Follows:

SECTION 472. Any pleading may be amended once by the party of course, and without costs, at any time before answer

or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section four hundred and sixty-two.

The amendment strikes out the words now in the section "and when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed." This is to harmonize the section with section 430 *supra.*

Amend Section 476 of the Code of Civil Procedure so as to Read as Follows:

SECTION 476. When a demurrer to any pleading is sustained and time to amend is given, the time so given runs from the service of notice of the decision or order.

This amendment omits the provision with respect to giving time to answer when a demurrer is overruled so as to bring it in line with section 430 *supra.*

II.

EXCEPTIONS

Under the present practice it is sometimes necessary to serve bills of exceptions, notices, etc., upon a party in default. This, we think, should never be required. A party who has been duly brought into court and has defaulted should never be heard to complain of any relief that is given to his opponent so long as the pleadings have not been amended. We therefore recommend that

Section 650 of the Code of Civil Procedure Be Amended so as to Read as Follows:

SECTION 650. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, at any time thereafter, and within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action was

tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party; but the bill need not be served upon any party whose default has been duly entered. Such draft must contain all the exceptions and proceedings taken upon which the party relies. It may also contain a statement of any matters occurring upon the trial, in the presence of the court, showing any of the matters mentioned in subdivisions one and two of section six hundred and fifty-seven of this code. Within ten days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately deliver them to the judge, if he is in the county; if he is absent from the county, and either party desires the paper to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee must settle the bill. If no amendments are served or if served are allowed, the proposd bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party.

It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions and proceedings may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and must then be filed with the clerk.

The amendment consists in the addition of the provision: "but the bill need not be served upon any party whose default has been duly entered." This amendment makes the definition of the "adverse party" conform to that in section 659 of the Code of Civil Procedure as proposed *infra*. The

reasons for the amendment are shown under that section. It has been held that the "adverse party" in section 650 means every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by a reversal or modification of, the judgment or order from which the appeal is taken.

Estate of Young, 149 Cal. 173, and cases cited.

III.

NEW TRIALS

We believe that the present procedure on motion for new trial is a cause of much delay in litigation and to that end we recommend the following amendments designed to simplify the practice:

Amend Section 658 of the Code of Civil Procedure so as to Read as Follows:

SECTION 658. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it must be made upon the minutes of the court.

The amendment strikes out of the present section the provisions for moving upon a bill of exceptions or statement of the case. In other words, under the proposed section, the motion can be made only upon affidavits or the minutes of the court.

In practice, under the present code, the motion for a new trial is seldom made on the minutes of the court.

In *Malcolmson* v. *Harris,* 90 Cal. 262, the supreme court, referring to sections 658, 659, 660 and 661 of the Code of Civil Procedure, said:

"By these various provisions a very simple, plain, and expeditious practice is prescribed, by which the trouble, expense and delay of settling statements or bills of exceptions may be entirely avoided in all that large class of cases in which the order of the trial judge granting or denying a new trial is accepted as final, as it always must be—so far as the ground we are considering is concerned—when there is a substantial conflict of evidence. And even

> where the losing party wishes to appeal, it will generally be easier and more convenient to make a statement after than before the order; for the argument of the motion will generally eliminate many of the points, as its decision will always do away with the necessity of setting out evidence upon points as to which there is an admitted conflict. *The wonder is, that a practice so convenient, so saving of time, trouble and expense, is so little resorted to.*"

The foregoing language was referred to with approval in *Vinson* v. *L. A. etc. Co.*, 141 Cal. 153, where the court again commended the practice of moving upon the minutes of the court.

As will be seen, the principal changes which we propose in the existing law consist in the elimination of two of the four ways upon which a motion for new trial may now be made, leaving, however, the procedure described by the supreme court as "a very simple, plain and expeditious practice."

Under the existing practice the motion for new trial is usually made upon a bill of exceptions or a statement of the case and the delay in preparing these documents is very great. By the time the bill of exceptions or statement is settled and engrossed so that the matter can be brought to hearing, it is necessary for counsel upon both sides again to prepare upon the law, and any study that the judge may have given to the matter at the time of the trial has probably faded from his memory under the pressure of other matters.

If the motion be made upon the minutes of the court, there is ordinarily no reason why it cannot be brought to hearing within a few days after the trial, when the law and the facts are fresh in the minds of all concerned. Where the motion is made upon the ground of insufficiency of the evidence to justify the verdict or decision, if the evidence be conflicting, it is useless to ask the appellate court to review the action of the trial court on the motion and the bill of exceptions prepared after the motion is heard will, in all such cases, be much shorter than if prepared beforehand, thus saving time and expense.

The statement of the case seems to be something entirely unnecessary in our system of practice and its only tendency has been to add to the difficulty of practice and to make for confusion. This is illustrated in *Pease* v. *Fink*, 3 Cal. App. 377, where the point was made that the appeal from the

order denying a new trial could not be considered, for the reason that in the notice of intention therefor the defendant stated that it would be made upon affidavits and a bill of exceptions thereafter to be prepared and settled, whereas the document set forth in the transcript is entitled: "Engrossed Statement of the Case." The court said:

> "The procedure for obtaining a new trial, authorized by section 659 (2) of the Code of Civil Procedure, implies that a bill of exceptions may have been settled before notice of the motion shall have been given, and that in such case the bill shall be used on that motion. If, however, no bill has been settled, the same procedure is prescribed for its settlement as for the settlement of a statement of the case. *There is no substantial difference between the two documents when settled; the only difference being that in a statement of the case the moving party, in addition to setting forth in the body of the document, the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion.*"

Amend Section 659 of the Code of Civil Procedure so as to Read as Follows:

> SECTION 659. The party intending to move for a new trial must, within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of the judgment, if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court; but no notice need be served upon any party whose default has been duly entered.
>
> If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party.
>
> It shall be sufficient in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity.

The changes consist in

(a)—Making the ten days run as provided in section 650.

(b)—Adding the provision at the end of the first paragraph that no notice need be served upon any party whose default has been duly entered.

This provision is inserted so as to make it unnecessary to serve the notice of intention to move for a new trial upon any party who has defaulted, whether such party be adverse or not.

In the matter of *Castle Dome Mining etc. Co.*, 79 Cal. 246, it was held that upon an appeal taken by petitioning creditors from an order dismissing a proceeding in insolvency against a foreign corporation for alleged want of jurisdiction, though the corporation made default, and the controversy was between the petitioning creditors and attaching creditors of the corporation, the notice of appeal must be served upon the corporation as well as upon the attaching creditors, in order to give the supreme court jurisdiction of the appeal, since the judgment was in favor of the corporation and a reversal would affect its rights.

This case has been repeatedly cited and followed and though the question in that case related to the service of notice of appeal the same rule seems to have been applied with respect to service of notice of intention to move for a new trial.

In *Johnson* v. *Phenix Insurance Company*, 146 Cal. 571, the defendant, Bank of San Mateo County, apparently did not answer, demur or give written notice of appearance (see foot of page 573). The notice of appeal and notice of intention to move for a new trial were not served upon the bank. For this reason the appeal from the judgment was dismissed and when the case came up for consideration on the merits, 152 Cal. 196, the order denying a new trial was affirmed on the ground that the bank was an adverse party and should have been served with the notice of intention.

The court said:

> "Section 659 of the Code of Civil Procedure, however, requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention'. The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for a new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an

issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it. See also, *Barnhart* v. *Fulkerth*, 92 Cal. 155 [26 Pac. 221]; *In re Ryer*, 110 Cal. 556, 559 [42 Pac. 1082]; *Estate of Young*, 149 Cal. 173 [85 Pac. 145].)"

(c)—Striking out the words "or such further time as the court in which the action is pending, or a judgment thereof, may allow", so as to make the same rule for original and reply affidavits.

(d)—Striking out the provisions regarding statements and bills of exceptions.

What has already been said in explanation of the amendment of section 658 covers the proposed amendment of section 659 in this respect.

The present section contains a provision at the end of paragraph second, reading: "If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion." This paragraph we have incorporated in section 660, hereinafter referred to, so that in moving for a new trial upon the minutes of the court any bill of exceptions that may have been settled during the trial of the cause may be used and referred to upon the hearing of the motion.

(e)—Changing the rule requiring the notice of motion to specify the particulars in which the evidence is insufficient and the particular errors upon which the party will rely.

Under the proposed amendment a specification in the language of the statute will be sufficient. This we find to be the practice in many of the states and as, under the procedure contemplated by the amendment, the motion for a new trial will ordinarily be made very shortly after the case has been tried, it would seem proper that the whole matter of the trial should be subject to review by the trial court. When the bill of exceptions is prepared it will, of course, show the errors to be brought to the attention of the upper court for review.

We find this practice established by statute in

Utah, Code of Civil Procedure, sec. 3293;
Nebraska, Cobbey's Annotated Statutes, 1909, sec. 1302;
Washington, Remington & Ballinger's Code, 1910, sec. 400.

Amend Section 660 of the Code of Civil Procedure so as to Read as Follows:

SECTION 660. The application for a new trial must be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases after the affidavits are filed, and may be brought to hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial, to oral testimony adduced at the trial, to rulings made by the court or referee and to the report of the proceedings on the trial taken by the phonographic reporter or to any certified transcript of such report. If a bill of exceptions has been already settled and filed when the notice of motion is given reference may also be had to such bill.

In *Malcolmson* v. *Harris,* 90 Cal. 262, it was held by the court that the enumeration in section 660 of the Code of Civil Procedure of the matters to which reference may be had on the hearing of the motion and the minutes of the court, is not necessarily exclusive and the court said, page 265:

"The mere fact that there is no shorthand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature. We think the law demands no such construction; the enumeration in section 660 is not necessarily exclusive, and it is contrary to all considerations of justice and convenience to hold that it was intended to be. That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment."

In view of this decision it may be said that the amendment adding certain matters that may be referred to upon the hearing of the motion is unnecessary, but we have made the addition as a matter of precaution, lest it be urged that the amendment of the statute, after the decision of the Harris case, without change in this respect, would require the construction that the amended statute is now exclusive.

Amend Section 661 of the Code of Civil Procedure so as to Read as Follows:

SECTION 661. The affidavits, authenticated as having been used on the hearing, by the certificate of the judge indorsed thereon, together with the judgment-roll and a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, when the motion is made upon affidavits. When the motion is made on the minutes of the court, the judgment-roll with a copy of the order made and a bill of exceptions shall constitute the record on appeal. Such bill of exceptions shall be proposed within ten days after the entry of the order and shall be settled as provided by section six hundred and fifty.

The reasons for the changes in the foregoing section are as follows:

(a)—Under the law as it now exists, if a motion for a new trial is made upon affidavits, it is necessary, after the determination of the motion, for the losing party to prepare a bill of exceptions in order to bring the affidavits before the appellate court.

Somers v. *Somers,* 81 Cal. 608;
People v. *Terrill,* 131 Cal. 114.

It seems that the present practice arose from the fact that section 661 makes no provision for authentication of affidavits whereas the old practice act did make such provision.

See Statutes of 1861, page 590.

We think the affidavits used on motion for a new trial can be properly authenticated by the certificate of the trial judge endorsed thereon, just as well as by a bill of exceptions, and this practice will occasion no delay in cases where the motion is made upon affidavits, whereas, if a bill of exceptions is necessary, delay will be unavoidable.

(b)—We have provided that, where the motion is made upon the minutes of the court, the party desiring to appeal shall prepare a bill of exceptions and that the bill shall be prepared as provided in section 650 of the Code of Civil Procedure. The present statute provides that a statement shall be prepared and that the proceedings in preparing the same shall be had, and within like periods, for the settlement of the statement as provided by section 659. Upon referring to section 659 we find that the proceedings are partially

described and are then to be carried on as provided by section 650. As all of the machinery for the preparation of statements and bills of exceptions set forth in section 659 has been eliminated by our proposed amendment, we think the entire practice should be assimilated to that set forth in section 650 so that there may be but one rule for the preparation of bills of exceptions in all cases.

(c)—The section as it now stands provides that the statement shall only contain the grounds argued before the court for a new trial and so much of the evidence or other matter as may be necessary to explain them. This language has been omitted from the proposed section for the reason that section 950 of the Code of Civil Procedure provides that any statement settled after decision of motion for a new trial, when the motion is made upon the minutes of the court, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial. The amendment aims to make it possible to so prepare the bill of exceptions that it may cover all matters to be used on either appeal.

An examination of the statutes of several states regarding motion for new trial shows that the present California law is more complex and goes more into detail than that of any state whose law we have examined, except such states as have followed the California law, notably, Montana, Idaho, Nevada, North Dakota and South Dakota. Utah formerly had the California practice. In 1898 it adopted the simple procedure that we here recommend and which has been found to work there most admirably. The laws of many of the states are most general, some of them providing practically no procedure, but apparently leaving the matter to rules of court or to the general law regarding exceptions.

In Kansas it is provided: "The application must be by motion upon written grounds filed at the time of making the motion. The causes enumerated in subdivisions 3 and 7 of section 306 must be sustained by affidavits showing their truth and may be controverted by affidavits."

Kansas General Statutes, 1905, section 5205.

The Kansas law is substantially the same as that of Iowa, Indiana, Nebraska, Ohio, Oklahoma and Wyoming.

Iowa, Annotated Code, 1897, section 3756;

Indiana, Burns' Annotated Statutes, Revision of 1908, section 588;

Nebraska, Cobbey's Annotated Statutes, 1909, vol. I, sections 1299 and 1302;
Ohio, Bates' Annotated Ohio Statutes, 1906, sections 5305-5309;
Oklahoma, Revised and Annotated Statutes, 1903, sections 4493-4497;
Wyoming, Revised Statutes. 1899, sections 3746-3750.

Other laws dealing with the same subject will be found in

Colorado, Mills' Annotated Code, 1905, section 219;
Connecticut, General Laws, Revision 1902, section 815;
Minnesota, Revised Laws, 1905, section 4199;
Missouri, Annotated Statutes, 1906, sections 800-803;
New York, Stover's Annotated Code of Civil Procedure, 1902, section 999;
North Carolina, Pell's Revisal, 1908, section 554;
South Carolina, Code 1902, section 2734;
Washington, Remington & Ballinger's Codes and Statutes, 1910, sections 398-403;
Wisconsin, Sanborn & Berryman's Statutes, 1898, and Supplement, 1899-1906 (Sanborn & Sanborn), sections 2878-2880.

IV.

APPEALS

Amend Section 940 of the Code of Civil Procedure so as to Read as Follows:

SECTION 940. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney, but no notice need be served upon any party whose default has been duly entered.

The change consists in:

(a)—Inserting the provision that "no notice need be served upon any party whose default has been duly entered", to make the section conform to the proposed amendment of sections 650 and 659, *supra*.

(b)—Striking out the present provision of the section requiring the $300.00 undertaking.

We think it is generally recognized by the bench and bar

that this undertaking is practically useless. More time has been wasted by court and counsel in considering the effect of this requirement of the law than could be paid for by the moneys that have been collected under it. No undertaking is required under the alternative method of appeal provided for in sections 941a *et seq.*, enacted in 1907, and the two methods of appeal should be harmonized in this respect.

The adoption of this amendment will make necessary the repeal of section 941 and the amendment of sections 947, 948 and 949 so as to strike out the references therein to the $300.00 undertaking.

Amend Section 950 of the Code of Civil Procedure so as to Read as Follows:

SECTION 950. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions upon which the appellant relies.

Any bill of exceptions settled after decision of motion for a new trial, when the motion is made upon the minutes of the court, as provided in section 661, or any bill of exceptions settled, as provided in section 649 or section 650, or used on motion for a new trial may be used on appeal from a final judgment equally as upon the appeal from the order granting or refusing the new trial.

The amendment consists in eliminating the reference to statements used on motion for new trial, to make the section conform to the proposed amendments to sections 658 *et seq.*, *supra.*

CRIMINAL PROCEDURE

We recommend the following amendments to the Penal Code:

I.

THE GRAND JURY

Amend Sections 894 and 895 of the Penal Code so as to Read as Follows:

SECTION 894. Before accepting a person drawn as a grand juror, the court must be satisfied that such person is duly qualified to act as such juror, but when drawn and found qualified he must be accepted unless the court, on the application of the juror and before he is sworn, shall excuse him from such service for any of the reasons prescribed in Chapter I, Title III, Part I (Sections 190-254) of the Code of Civil Procedure.

SECTION 895. No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court for want of qualification, as prescribed in the next preceding section.

The adoption of this law will necessitate the repeal of sections 164 and 896-901 inclusive, and the amendment of section 995 of the Penal Code.

The proposed statute is taken from the Oregon Statute, sections 1268, 1269, Ballinger & Cotton's Code.

The constitutionality of the Oregon act was passed upon and sustained in *State* v. *Carlson,* 62 Pac. 1016.

See, also, *People* v. *Arnold,* 15 Cal. 476.

The object of the proposed change is to do away with long investigations at the instance of indicted persons regarding the qualifications of grand jurors. We believe such procedure generally results in no advantage to the defendant; it is expensive to the state and brings the administration of criminal law into disrepute.

II.

AMENDMENTS

Amend Section 1008 of the Penal Code so as to Read as Follows:

SECTION 1008. An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court (or by leave of court) where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.

If a demurrer is sustained, and an amendment is not allowed, or if allowed, is not made, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court is of the opinion that the transaction involved in the charge constitutes a different offense, in which it may hold the defendant and direct the matter to be submitted to the same or another grand jury, or direct another preliminary examination.

The portion of this section relating to informations follows section 9108 of Montana Revised Code of 1907, section 4694 of Utah Compiled Laws of 1907, section 6645 of Compiled Laws of Oklahoma of 1909, and section 2481 of Missouri Statutes of 1899. Somewhat similar statutes are found in Kansas, Louisiana, Michigan, Wisconsin and other states and their validity is unquestioned.

New York, Wisconsin, Montana, Texas, Louisiana, Mississippi, and other states have enacted statutes providing for amendment of indictments.

The spirit of our law demands the disregard of technicalities as shown by sections 953-960, 1258 and 1404 of the Penal Code, and the proposed amendment has that end in view. It will be observed that under the proposed law the indictment cannot be amended so as to change the offense charged.

The following cases illustrate the extent to which the courts have sustained amendments to indictments and information:

Amendment of Indictment.

People v. *Kelly,* 6 Cal. 210;
People v. *Jones,* 113 N. Y. S. 1097, 88 N. E. 1127;
State v. *Hanks,* 1 So. 458 (La.);
McGuire v. *State,* 44 So. 802 (Miss.);
State v. *Gibson,* 45 So. 271 (La.), (cites many cases);
Baker v. *State,* 59 N. W. 570 (Wis.);
People v. *Johnson,* 10 N. E. 690, 104 N. Y. 213;
State v. *Shultz,* 114 N. W. 505 (Wis.);
State v. *Means,* 61 S. E. 898 (So. Car.), (objection to indictment waived).

Amendment of Information.

State v. *District Court,* 104 Pac. 282 (Utah);
Lancaster v. *State,* 103 Pac. 1065 (Okla.);
Rose v. *State,* 103 Pac. 1066 (Okla.);
McLaughlin v. *State,* 102 Pac. 713 (Okla.);
State v. *McKee,* 17 Utah 370, 52 Pac. 733;
State v. *LaChall,* 28 Utah 80, 77 Pac. 3;
State v. *Coleman,* 186 Mo. 151, 69 L. R. A. 381;
Wade v. *State,* 108 S. W. 677 (Tex.);
State v. *Oliver,* 50 Pac. 1019 (Mont.).

Hughes' Criminal Law, section 2761, and Bishop's Criminal Procedure, sections 97-98, agree that amendment of indictments in matters of form may be provided for by statute.

Bishop, section 711, says that amendments in matters of substance can be made to a limited extent if at all.

III.

ARRAIGNMENT

Amend Section 988 of the Penal Code so as to Read as Follows:

SECTION 988. **The arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a true copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information.**

The amendment omits the following language now found in the section:

> Provided that if an indictment has been found against the defendant, at the time of his arraignment, he shall be served with a true copy of the testimony given in his case before the grand jury.

It leaves the law as enacted in 1872. The proviso now sought to be omitted was added in 1909, evidently to make this section conform to section 925 hereinafter referred to.

This amendment of section 988 will also necessitate the amendment of section 925 of the Penal Code, which was amended in 1897, so as to require the grand jury, on demand of the district attorney, to appoint a stenographic reporter to report the testimony that might be given, and providing that a copy of the testimony so taken, must be delivered to the defendant upon arraignment after indictment. (Stats. 1897, p. 204). The same section was further amended in 1909 (Stats. 1909, p. 1126) so as to require that all testimony in criminal causes being investigated before the grand jury must be thus reported and a copy must be filed with the clerk of the court within ten days after the finding of the indictment and delivered to the defendant upon his arraignment after indictment as provided by section 988.

In *In re Kennedy,* 144 Cal. 634, which lays down the principle that "the court cannot inquire into the sufficiency of proof or the mode of examining witnesses to invalidate an indictment," also says that section 925, Penal Code, which provides for the reporting of the testimony taken before the grand jury

> "on the demand of the district attorney, is evidently for the benefit of the district attorney—probably for the purpose of preventing witnesses of a certain character from safely giving testimony before the trial jury different from that which they had given before the grand jury."

The amendments of 1909 to sections 925 and 988 of the Penal Code, it is clear, are for the benefit of the persons accused by the grand jury. The taking down of the testimony on which an indictment is found is made obligatory and a "true" copy thereof must be served upon the defendant at the time of his arraignment.

The theory upon which our Penal Code was framed was that all proceedings before a grand jury were to be kept secret

and that a person accused by a grand jury was entitled to know the names of the witnesses, which were required to be endorsed on the indictment, but it was not his right to have the testimony on which the indictment was found.

People v. *Tinder*, 19 Cal. 539, an opinion by Justice Field, contains a presentation of the older theory and a statement of the law as it then stood. The opinion says:

> "The deliberations of that body are secret and the law does not permit the testimony received by them to be disclosed."

And, further:

> "The statute of this state, in regulating the proceedings before grand juries, makes no provision for the preservation of the testimony which may be taken before them. And though it does not in express terms prohibit the disclosure of testimony taken, it does so impliedly."

The Pacific States that adopted our code provisions have not amended their statutes with reference to the testimony taken before the grand jury, for example:

Utah, sec. 4768, Comp. Laws, 1907;
Oregon, sec. 1328, Ballinger & Cotton's Compl.;
Nevada, sec. 4234, Comp. Laws, 1900;
Idaho, sec. 5371, Comp. Laws, 1902;
Montana, sec. 9190, Comp. Laws, 1907.

Nor is the testimony taken before federal grand juries preserved except as desired by United States district attorneys, nor are persons indicted by federal grand juries informed of the evidence against them.

We believe that the requirement that all the testimony taken before grand juries shall be taken down by a stenographer and transcribed and filed with the clerk and that a copy thereof be served upon the defendant, adds unnecessarily to the expense of grand juries, encumbers their deliberations, robs their proceedings of secrecy, and gives accused persons (and other persons who are likely to be accused) the opportunity of thwarting justice. This latter consideration we deem to be an important one, for, while in theory it is only fair to an accused person to know what the witnesses against him have testified to, we know that under our system there is only the remotest possibility that an innocent person will be convicted, and we believe that such information is commonly

used by the guilty to build up defenses and get rid of witnesses.

IV.

EVIDENCE

The Enactment of a New Section to Be Added to the Penal Code to Be Known as Section 1324, as Follows:

SECTION 1324. No person, otherwise competent as a witness, shall be disqualified or excused from testifying concerning any of the offenses enumerated and prescribed in sections 67, 68, 74, 74a, 85, 86, 92, 93, 95, 96, 97, 99, 100, 127, 137, 138, 165, and 182, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against such witness for any offense concerning which he was compelled to testify for the prosecution.

We think that the enactment of such a law will make it easier to secure convictions in those classes of crimes where more than one person is involved and, also, that the law will have a direct tendency to discourage such crimes, because of the fear that each party will have of the confession of the other.

This section follows generally the form of section 64 of the Penal Code. A law based upon the same principle is found in the Statutes of 1907, page 675. It may be better in making the amendment to follow the form of this statute. We understand this form has been followed in New York and it is the form adopted in some of the federal statutes. See Wigmore on Evidence, sections 2250-2282.

V.

CONSTITUTIONAL AMENDMENTS

We recommend the following amendments to the constitution:

Amend Article I, Section 7, of the Constitution so as to Read as Follows:

ARTICLE I, SECTION 7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil and criminal actions, three-fourths of a jury may render a verdict,

provided, however, that in all cases where the death penalty must be pronounced by the court, or where the offense is committed before the adoption of this amendment, the verdict must be unanimous. A trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

The change consists in the addition of the words printed in black faced type. The purpose of the amendment is to enable nine jurors to bring in a verdict in any criminal case except capital cases. As is well known, it has been the law of this state since 1879 that nine jurors can enter a verdict in a civil case.

The amendments to the federal constitution with respect to trial by jury have no bearing upon the case, as they are not applicable to the legislation of the states.

Barron v. *Mayor of Baltimore,* 7 Pet. 243; 8 Law ed. 672. See also the cases cited in the Note, Law ed.
Fox v. *Ohio,* 5 How. 410; 12 Law ed. 213;
Walker v. *Sauvinet,* 2 Otto 90; 23 Law ed. 678;
Twitchell v. *Pennsylvania,* 7 Wall 321; 19 Law ed. 223;
Edwards v. *Elliott,* 21 Wall. 532; 22 Law ed. 487;
Ex parte Spies, 123 U. S. 131; 31 Law ed. 80;
Ex parte Sawyer, 124 U. S. 200; 31 Law ed. 402;
Eilenbecker v. *District Court,* 134 U. S. 31; 33 Law ed. 801;
Twining v. *New Jersey,* 211 U. S. 78; 53 Law ed. 97.

A state law providing for a jury of less than twelve jurors in a criminal case, does not deny the right of the defendant to due process of law in violation of section 1 of article 14 of the federal constitution.

Maxwell v. *Dow,* 176 U. S. 581; 44 Law ed. 597.

The same principle has been enunciated in the cases holding that a conviction upon an information instead of upon an indictment, is not illegal by virtue of the fourteenth amendment, which prohibits the states of depriving any person of life, liberty or property without due process of law.

Hurtado v. *California,* 110 U. S. 516; 28 Law ed. 232.
Ex parte Spies, 123 U. S. 131; 31 Law ed. 86.

The number of jurors necessary to return a valid verdict is discussed at length in the note to *State* v. *Bates*, 43 L. R. A. 33, wherein it is shown that the state of Florida and the state of Utah have provided for the trial of criminal cases by juries of less than twelve.

A substitution of a jury of eight persons in place of a common law jury in the case of a crime committed before the change in the law, constitutes an *ex post facto* law.

Thompson v. *Utah*, 170 U. S. 343; 42 Law ed. 1061;
Thompson v. *Missouri*, 171 U. S. 386; 43 Law ed. 207;
State v. *Baker*, 50 La. An. 1247; 69 Am. St. Rep. 472;
Murphy v. *Commonwealth*, 172 Mass. 264; 70 Am. St. Rep. 266;
State v. *Ardoin*, 51 La. An. 169; 72 Am. St. Rep. 454.

But the amendment, as proposed, provides an exception for offenses committed prior to its passage.

Amend Article I, Section 13, of the Constitution so as to Read as Follows:

ARTICLE I, SECTION 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be deprived of life, liberty or property without due process of law; nor be compelled, in any criminal case to be a witness against himself, **provided that the prosecuting officer may make such comment upon the failure of the party accused to testify, and the court may give such instructions to the jury regarding the same, as the legislature by law may provide.** The legislature shall have power to provide for the taking in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases other than cases of homicide, when there is reason to believe that the witness from inability or other cause will not attend at the trial.

The change consists in the addition of the words printed in black faced type.

There is no doubt of the power of the state to make this change.

Bowman v. *Lewis*, 101 U. S. 22; 25 Law ed. 989.

Exemption from self incrimination, though secured as

against federal action by the fifth amendment to the United States constitution, is not one of the fundamental rights of national citizenship so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden by the fourteenth amendment to abridge. It is not safeguarded as against state action by the due process of law provision of the fourteenth amendment of the federal constitution.

Twining v. *New Jersey,* 211 U. S. 78; 53 Law ed. 97.

This case contains an elaborate discussion of the subject and goes into the history of the law at length, showing that it was the practice in England, several hundred years after Magna Charta, to question the defendant in criminal cases. It appears, however, that all of the states of the union have included the privilege in their constitutions except the states of New Jersey and Iowa; and in each of these states it is held to be part of the existing law, citing:

State v. *Zdanowicz,* 69 N. J. L. 619; 55 Atl. 743;
State v. *Height,* 117 Iowa, 650; 59 L. R. S. 437; 94 Am. St. Rep. 323; 91 N. W. 935.

The contention in the Twining case was, that the court, by commenting upon the failure of the accused to testify, violated his fundamental right to remain silent. The New Jersey court held that this was not a violation of the privilege, and this view was sustained by the Supreme Court of the United States.

In Wigmore on Evidence, sections 2250-51 *et seq.,* there is a full discussion of the privilege against self incrimination, particularly in section 2251. The author concludes that the privilege should be preserved—pages 3097-3098.

The opposing views have been presented by the supreme courts of California (1869) and Maine (1871) and we quote from the opinions at length.

In *People* v. *Tyler,* 36 Cal. 529, the California court said:

> "At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the People the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the

evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the constitution, which says, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.

"Whatever the ordinary rule of evidence with reference to inference to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question."

The views of the Maine court expressed in *State* v. *Cleaves*, 59 Maine 298, 8 Am. Rep. 422, were as follows:

"The statute authorizing the defendant in criminal proceedings at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence.

"The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance.

"Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offense incurred.

"But the defendant, having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him

by the law. His declining to avail himself of the privileges of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? All the analogies of the law are in favor of their regarding this as an evidentiary fact. All the acts of a party accused, whatever explains or throws light upon those acts, all the acts of others, relative to the crime charged, that come to his knowledge and which may influence him; his loves and his hates, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretenses and explanations; his looks, his speech, his silence when called upon to speak; everything which tends to establish the connection between the accused and the crime with which he is charged; every circumstance preceding, accompanying or following may become articles of circumstantial evidence of no slight importance. 'A statement is made either to a man or within his hearing, that he was concerned in the commission of a given crime, to which he returns no reply, the natural inference is, that the imputation is well founded or he would have repelled it; silence is tantamount to confession.' Best on Presumptions, sec. 241. Extra judicial nonresponsion, when a charge is made, is always regarded as an article of circumstantial evidence, the probative effect of which may be weakened by various informative considerations, which it is not now necessary to discuss, but which are to be considered and weighed by the jury.

"When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him is not that a fact ominous of criminality? Is his silence of any the less probative force, when thus in court called to contradict or explain, by the pressure of criminative acts, fully proved, that by extra judicial silence when a charge is made to him or in his presence. The silence of the accused—the omission to explain or contradict when the evidence tends to establish guilt is a fact —the probative effect of which may vary according to the varying conditions of the different trials in which it may occur, which the jury must perceive and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye.

"It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make, if he does not avail himself of the privilege of contradiction or explanation. It is his fault, if, by his own misconduct or

> crime, he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony if truly delivered."

The California opinion no doubt correctly expounds the law as expressed in our constitution; but we believe that upon the general principle, the reasoning of the Maine court will appeal to most people as sound. The average man, seeing a defendant remain silent after evidence has been presented tending to show his guilt, will be apt to think his silence is further evidence in the same direction. It would seem better to let such action of the accused have its natural weight than to tell the jury as is now done, that it must shut its eyes to this very obvious evidence. For the same reason the silence of the defendant should be properly the subject of comment by the prosecutor. The cause of justice will not be injured by permitting the jury to draw from the action of the defendant such inferences as are indicated by common sense and the experience of mankind.

It will be observed that the proposed amendment merely puts it in the power of the legislature to change the law if it desires. The constitutional provision is not self-executing.

It seems hardly necessary to say that the proposed changes do not include all of the amendments that might with advantage be made to our codes. For instance, the matter of instructions to juries, especially in criminal cases, is one of great difficulty and concerning which there has been much criticism. We have not, however, arrived at any conclusions upon that subject.

We also commend to the attention of the bar the paper read by Chief Justice Beatty at the meeting of the association on May 20, 1909, regarding the jury system.

We have not attempted to make many changes; but have confined ourselves to a few amendments which we deem of great importance.

In proposing amendments to our procedure it is easy to amend one section in such a way as to affect another section which may at the time be overlooked. We therefore hope that this report will be carefully examined by members of the

bench and bar so that if we have made any oversight in this respect it may be brought to our attention.

Respectfully submitted,

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BOUTWELL DUNLAP,
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GRANT H. SMITH.

APPENDIX

LETTERS OF SUPERIOR JUDGES

A letter was sent to each superior judge of the state, reading as follows:

> This committee is asking each of the superior judges of the state the following questions, and will much appreciate your reply thereto:
>
> 1. What, in your opinion, are the principal causes of delay in civil cases?
> 2. What, in your opinion, is the remedy for such delays?
> 3. What, in your opinion, are the principal causes of delay in criminal cases?
> 4. What, in your opinion, is the remedy for such delays?

The following is an analysis of the replies:

Less than thirty judges sent replies. One replied that tenure of office should be for life. Three stated there was no delay in criminal cases in their jurisdictions. Another stated there was no cause for complaint, except in San Francisco, where there should be eighteen departments. One said it is not the law, but our civilization and people which are at fault.

Another said that in his county (Alameda), there are sixty thousand people to one judge, with which condition he could not cope. Another, that in counties where there are several judges, there is not a proper assignment. Another, that there are not enough judges in San Francisco and in Los Angeles.

Seventeen expressed themselves that continuances were the cause of delay. Six of these mentioned both attorneys and judges as at fault, while eleven mentioned attorneys alone. Nine criticized the system of appeals; seven, our system of choosing jurors; three, time demurrers; three, the too great attention given to technicalities and trivialities. The district attorney was twice criticized for delay, and one judge believed too much time is given to that officer to file informations. One desired instructions given by topic; another said that the standard for admission to the bar should be raised.

The remedies proposed are more varied than the causes, and may not be placed under topical heads. Continuances, lack of judges in several counties, system of appeals and the choosing of jurors stand out prominently in the letters received as subjects for criticism and the attention of the committee.

LETTERS OF ATTORNEYS-GENERAL

The following letter was addressed to all of the attorneys-general of the United States, most of whom favored us with a reply:

> This committee is informed that in at least one of the United States it is not the practice to instruct the jury in

criminal cases, but that the jury is the judge of the law and the facts.

We recognize that reversals on the ground of errors in giving, refusing or modifying instructions are quite frequent.

Will you kindly inform us:

1. Are instructions required by law in your state?
2. Reference to the statute governing the same?
3. If instructions are required, what is your experience with respect to reversals for errors in instructions?
4. If instructions are not required, what is your experience as to the efficiency of the law with respect to the conviction of criminals, and the justness of verdicts?
5. What is your opinion with respect to the necessity of instructions in criminal cases?
6. If you deem instructions necessary, what, if any limits do you think should be placed thereon?

Any information that you deem of value to the committee, in addition to the answers to the foregoing questions, will be much appreciated.

The following is an analysis of their replies:

The attorneys-general of the various states, generally agree that reversals are frequent for erroneous instructions; all of them think that instructions are necessary, but many of them believe that they should be limited to a simple, clear statement of the law. Some of them, evidently, are of the opinion that appellate courts are too ready to reverse for error in instructions. The attorney-general of Virginia says that whatever instructions are given, the verdict of the jury is generally right. The attorney-general of Idaho has come to doubt the necessity of instructions in criminal cases. They practically all agree that judges should not comment on the facts.

The attorney-general of Montana thinks that their new practice of settling instructions before they are given (Sec. 6746, Civil Practice, and sec. 9271, Criminal Practice) and that of requiring exceptions to specifically indicate objections, is an improvement.

The attorney-general of Missouri says: "Many reversals are on technical grounds, and would not have affected the merits of the case in the least."

The attorney-general of Oklahoma says: "Our courts will not reverse on account of erroneous instructions, if it is apparent that none of the substantial rights of the accused were prejudiced thereby."

The attorney-general of South Dakota thinks instructions should be limited to a "plain, clear, concise statement only of such law as is necessary to a determination of the case."